

No. 76-216

Supreme Court, U. S.  
FILED

NOV 3 1976

MICHAEL ROSEN JR., CLERK

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*In the Supreme Court of the United States*

OCTOBER TERM, 1976

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JOSEPH ANTHONY CORDOVA, PETITIONER

v.

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS FOR  
THE NINTH CIRCUIT*

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**MEMORANDUM FOR THE UNITED STATES IN  
OPPOSITION**

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ROBERT H. BORK,  
*Solicitor General,  
Department of Justice,  
Washington, D.C. 20530.*

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Petitioner contends that his federal prosecution, which began after a state prosecution based upon the same acts had been dismissed with prejudice for failure to comply with the state speedy trial rule, should have been held to be barred by the Double Jeopardy Clause.

After a jury trial in the United States District Court for the District of Arizona, petitioner was convicted of having possessed heroin with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1). He was sentenced to twelve years' imprisonment and fined \$10,000. The court of appeals affirmed *per curiam* (Pet. App.).

The evidence at trial showed that on November 2, 1973, Ruth Klase notified an officer of the Phoenix, Arizona, Police Department that petitioner had been storing large quantities of heroin at her house (Tr. 17-22, 31-32). Based

upon this information, city police officers obtained a search warrant for Klase's house and, upon executing the warrant, discovered three and one-half ounces of heroin wrapped in a plate that contained petitioner's fingerprint (Tr. 32-33, 94, 154, 171). Klase also turned over to the officers a briefcase belonging to petitioner containing \$51,000 in cash (Tr. 35). While the search warrant was being executed, petitioner appeared at Klase's house and, upon seeing the police officers, attempted to flee. After having struggled with petitioner, the officers subdued and finally arrested him (Tr. 106).

On November 14, 1973, an information was filed against petitioner in state court charging him with having possessed heroin with the intent to distribute it. The information was dismissed with prejudice in July 1974, without petitioner having been brought to trial, for failure to comply with state speedy trial rules. A federal indictment was returned against petitioner on January 22, 1975 (see Pet. App. 1a-2a).

The courts below correctly rejected petitioner's contention that his federal prosecution was barred by the Double Jeopardy Clause. As the court of appeals noted, petitioner's state prosecution was dismissed before he had been placed in jeopardy (Pet. App. 1a-2a), and it is axiomatic that "an accused must suffer jeopardy before he can suffer double jeopardy" (*Serfass v. United States*, 420 U.S. 377, 393). Even if jeopardy had attached in petitioner's state prosecution, moreover, it is settled that successive state and federal prosecutions do not violate the Double Jeopardy Clause even if they arise out of the same set of facts. *Abbate v. United States*, 359 U.S. 187;

*Bartkus v. Illinois*, 359 U.S. 121; *United States v. Lanza*, 260 U.S. 377.<sup>1</sup>

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,  
*Solicitor General.*

NOVEMBER 1976.

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<sup>1</sup>Petitioner incorrectly asserts (*e.g.*, Pet. 7) that the holding in *Bartkus*—and, presumably, in other cases—rests upon the proposition, overruled in *Benton v. Maryland*, 395 U.S. 784, that the Double Jeopardy Clause is inapplicable to the States. In fact, the holding in *Bartkus* and related cases proceeds from a recognition of separate state and federal sovereignty that is the very essence of federalism. Moreover, petitioner's argument wholly overlooks the fact that *Abbate* was a federal prosecution.

Petitioner's suggestion that the dual sovereignty principle underlying cases such as *Bartkus* should be reconsidered in the context of narcotics prosecutions where it is clear that local, state and federal officials "are necessarily working together to limit the traffic of narcotics into and among the various States" (Pet. 9) must be rejected. Cooperation between state and federal investigators is plainly a necessary and salutary element of effective law enforcement—particularly insofar as the investigation of large-scale narcotics operations is concerned. If state and federal cooperation at the investigative stage were to estop either sovereign from enforcing its own laws, the cooperation essential to effective law enforcement with respect to such matters would be seriously impaired. See *Bartkus v. Illinois*, *supra*, 359 U.S. at 123 n. 1.